

(2 February 12. 1745.]

REMARKS

UPON THE

ABSTRACT from the RECORDS
produced for the Creditors of *Langtoun*
in the Process,

Sir ALEXANDER COCKBURN of
Langtoun against them;

AS the Case, under Consideration, is the first of the Kind
that has been submitted to the Cognizance of the
Court, and of great Importance, with Regard to the
Precedent, the Lords will not think it impertinent in the Pur-
suer to venture a few Remarks upon this new Production
made for the Defenders.

And to pave the Way to these Remarks, the Lords will
keep in View the substantial Difference there is betwixt a Sub-
ject, the Property of which rests in one Person, exclusive of
all others, and a Subject, which one has *sub modo* or *sub con-
ditione*, wherein another Person at the same Time is interested.
The First is in Law Language called *allodial Property*, which
may be alienated at Pleasure, and consequently is attachable by
legal Diligence for Payment of Debt. Feus are a proper Ex-
ample of the other Case, the strict Nature of which are, That
the Granter retains the Property, and the Grantee has the Use
of the Subject under the Condition of personal Service. And
thus the Feudal Contract is defined, *L. 2. Feud. Tit. 23. Ces-
sio beneficiaria per quam jus utendi, fruendi, in perpetuum, rei*
immobilis,

immobilis, transfertur in accipientem, proprietate apud dantem remanente, sub lege fidelitatis & servitii. From this Definition it is obvious, that the Property could not be disposed of by the Vassal. But further, it is evidently deduceable from the Nature of the Contract, That the Vassal's Interest in the Subject, call it an *Usufruct*, or call it Property, was not alienable. The Use and Possession of the Subject can be consider'd in no other Light than as Wages given to a Servant, which cannot be diverted to any other Use without the Master's Consent. The Vassal is bound to serve his Superior in War, the Land is allotted to him for his Maintenance, and the Superior has an Interest to see that the Rents be applied accordingly.

Nor is there any Thing here, but what holds in every similar Case. A Tack is not adjudgeable, so as to entitle the Adjudger to be the Tenant in Place of his Debitor. An Undertaker contracts with a Gentleman to build him a House; let the Contract be ever so lucrative, none of the Undertaker's Creditors can adjudge the Contract, to be entitled to perfect the Building in place of their Debitor. The Contract is personal, and the Gentleman cannot be obliged to allow any Man to build his House, but the Person he covenanted with. Or suppose the Gentleman's Creditors shall adjudge the Land upon which the House is founded, and also adjudge the Contract, they will not be intitled to demand Implemēt from the Undertaker, who did not contract with them.

It has been fully explained in the Course of this Process, how Lands in Course of Time came to be reckoned *in commercio*, so as to be adjudgeable for Payment of the Vassal's Debt: This was fully established by the Act 36th, Parl. 1469, yet, to this Day, Lands retain so much of their original Constitution, that they cannot be alienated by the Vassal, without the Consent of the Superior, otherwise than by the Circuit of an Adjudication.

The single Question before the Court, is, Whether Feus of Offices have changed their feudal Nature as much as Lands have

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have done, to be *in commercio*, and to be adjudgeable for the Debt of the Officer? The Pursuer relies upon two Arguments, to prove that Offices retain their original feudal Nature, and that there is no Parity in this Particular betwixt Offices and Land, *1mo*. Nothing is a more natural Subject of Commerce than Land. Contrary to this Principle was the feudal Law established, very proper for a warlike People, but in a great Measure inconsistent with the Arts of Peace. No wonder then that the Feudal Law, with Regard to Land, is on the decaying Hand through all the Countries in *Europe*, and in some Countries quite wore out. But with Regard to Offices, the Feudal Law is a most reasonable Constitution, and equally adapted to all Times, of Peace, as well as of War; as it is against all good Policy that Offices should be venal. *2do*. In Consequence of this remarkable Difference betwixt Land and Offices, tho' we see an early Provision made in our Law for subjecting Land to the Payment of the Vassal's Debts, there is not the least Trace in any of our Statutes for bringing Offices under the same Situation; nor indeed the least Hint of this in any of our Law-Books, one Passage from *Craig* excepted, of which by and by. And as the above-mentioned Statute is the only Foundation we have for an Apprising; it is obvious from every single Clause in the Act, that it was never intended to be applied either to Dignities or Offices.

And now as to the Citation from *Craig*, L. 3. *Diag.* 2. *Seet.* 15. Which is in the following Terms, *Idem si Debitor aliquod Officium sive administrationem publicam, quæ ei est hereditaria, habuerit; nam et ea, ut ejus propria potest licitari. Dixi si hereditariam jurisdictionem habuerit: nam si tantum vitalem, ea tantum ei ex arbitrio alieno permittitur, et raro solet auctioni subjici, cum delegans possit non sine ratione asserere, jurisdictionem illam ad se jure quam optimo pertinere, beneficiumque illud personale, quod alicui indulsit, personam ejus non egredi, nec se posse cogi, ut alium in ejus locum recipiat.* This Authority must make an Impression; and therefore

fore must be examined to see what Weight ought really to be laid upon it. In the *first* Place, it will appear from perusing the whole Section, that our Author here is delivering his own Opinion, without pretending to found upon any Authority, either of Law, or of Practice. In the next Place, it appears to the Pursuer extremely plain, That our Author here is attempting at a Distinction, which, whatever Appearance it may have in an overly View, has certainly no Foundation in solid Principles. A hereditary Office is no more the Property of any one of the Incumbents, than a Life-rent Office is. And the Pursuer hopes he has made it out to the Satisfaction of the Court in former Papers, that the Heir, in a feudal Holding, takes nothing by his Predecessor, but must apply to the Superior for a new Grant, which is call'd *renovatio Feudi*. This is so true, that the Form holds in Lands to this Day, tho' the Substance for the most Part be vanished. But with Regard to Dignities and Offices, as the strict Rules of the feudal Law do, and ought to remain in *viridi observantia*; a hereditary Office or Dignity can be consider'd in no other Light than as a Series of Life-rents, where each Incumbent's Right dies with himself, making way for the Heir to apply to the Superior for a new Grant, which the Superior is bound to bestow in Terms of the original Contract. This was originally the Case of Land, as is plain from the Definition of a Feu above given. This at present is the Case of Dignities; and the only Reason, by the by, which can be given, why the taking up of a Predecessor's Dignity is not a passive Title. And the same must hold in Offices; so that, in this Particular, there can be no Difference betwixt a hereditary and life-rent Office. 3110. The very Reason given by our Author, and a solid one it is, why Life-rent Offices are not adjudgeable, does equally apply to a hereditary Office. The Reason given, is, That the Life-rent Officer is personally chosen by the Superior, who is not bound to receive another in his Place. Is not the Choice of a Family equally personal, so as to exclude all others not of that Family? And by what Rule is it that the Superior is bound to

to receive a Stranger, where he has chosen a Man and his Descendents to be his successive Officers, more than where he has confin'd his Choice to one Man only?

And when we are upon this Subject, nothing seems to afford a stronger Argument for the Pursuer, than that a Liferent-Office is not adjudgeable. There are many such Offices extremely lucrative, which would be a very savoury Bit to Creditors; Why ought not these to be attachable by Adjudication? Why ought such beneficial Subjects to be withheld from Creditors more than Land? The Reason is obvious; That an Officer is not an independent Being, to have his Office patrimonial and an allodial Property; he holds his Office of another, whose Servant he is; the Emoluments of his Office are his Wages, which cannot be diverted to another Use than for what they were given; and above all the Master, who has chosen this Man for his Servant, cannot be bound to accept of another Servant in his Place. Is not the Case precisely the same where an Office is granted for Life, with an Obligation to renew the same in favours of the Heir? When the Heir takes the Office in virtue of this Obligation, 'tis a Liferent-Office in his Person, just as it was in the Person of his Predecessor, and the same Rules will apply to both. 'Tis but carrying our View a little further, without any Variation in the Argument, to conceive a Liferent-Office granted to a Man, with an Obligation to renew the Grant in favours of the Heirs of his Body. And to support this Argument, let it be considered that a Liferent in Lands, whether a Locality or Annuity, is equally adjudgeable with a Property in Lands. Both are equally patrimonial, and so equally subjected to the Diligence of Creditors. A Liferent-Office is not adjudgeable, because it is not patrimonial. Is an hereditary Office more patrimonial than a Liferent-Office? Are not the Terms of the Grant the same in all Respects, except as to the single Article of Endurance? Is not personal Service the Condition of the Grant in the one Case, as well as the other? Are not the Emoluments of the Grant to be considered as the Servants Wages in the one Case as well as the other? And is

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not an heritable Officer under as strong a Prohibition against alienating his Feu, as a Liferent-Officer is? In short, viewing the Argument on all Sides, whatever Difference may appear in an overly View betwixt a Liferent and hereditary Office, yet when the Matter is accurately considered, the Argument, from the one to the other, seems to be conclusive, that both must be adjudgeable, or neither.

These Things shortly premised, we proceed to make some Remarks upon the Production, which was the principal Design of this Paper; and these shall be discuss'd in a very few Words. As to the *first* Branch, which 'tis supposed is adduced to prove the Practice of granting heritable Offices to Heirs and Assignies, not to make out, to be sure, that heritable Offices are granted by Charter and Infeftment, little needs be added to what is contained in the Papers upon this Subject. 'Tis an established Rule in all Feudal Holdings, That a Grant to Heirs and Assignies does not intitle the Vassal to alienate after Infeftment is taken; this even holds in Lands to this Day, *multo magis* in Offices and Dignities. If such a Clause has any Effect at all, it can only be to enable the Vassal to alienate with the Consent of his Superior; and there are Instances even of Dignities conveyed after this Manner, which have been thought to intitle the Acquirer to a Precedency, according to the Date of the original Grant.

The Pursuer is thankful to his Parties for the *second* Branch, because it makes a Discovery of what he was ignorant of, that there are special Retours of Offices as well as of Land. But what Argument can be drawn from this in favours of the Defenders does not readily occur, when it is certain that a Retour is nothing similar to an *aditio hereditatis* to connect an Heir's Right with that of his Predecessor, being intirely a Matter of Evidence which is laid before the King, to intitle the Heir to a Renovation of the Feu. And this is plainly the Nature of a Retour, and holds good to this very Hour, even in Land Rights. For a Demonstration of which we need go no further than this Consideration, That tho' a Man be retour'd, yet if he die before

fore Infeftment, he is not paffive liable to his Predeceffors Debts. Whence it is evident, that it is the Infeftment which fubjects him, not the Retour. And the plain Reason of this is, that Lands being now underftood patrimonial, an Heir who takes his Predeceffor's Estate ought, in all Juftice and Equity, be fubjected to his Predeceffor's Debts.

That heritable Offices may be in Non-entry, and fall under Ward, which is made out by the third and fourth Branches, would have been yielded without any Sort of Evidence. For this muft follow from their Nature being Feudal Holdings.

As little Ufe was there for the fifth, fixth, feventh, eighth and ninth Branches. For it was never doubted, that an Office, whether for Life, or hereditary, may be conveyed with the Consent of the Superior. For this is faying no more, than that a Mafter may pafs from the Contract with his Servant's Consent, and take another Servant in his Place.

The tenth Branch proves no more, than what is admitted in the Remark upon the third and fourth Branches.

The eleventh Branch is the only one of the whole, which is of any Sort of Weight in the Argument, as it contains three Inftances more than what were formerly given, of Apprifings of heritable Offices. The whole Inftances given do amount to no more than half a Dozen. And the Queftion is, whether this be a fufficient Condefcendence of a contrary Practice, to overturn the Common Law of the Land, founded upon a moft excellent Policy, and upon the moft folid Principles. What others may think upon this Subject, the Purfuer will not pretend to guefs; but, in his Apprehenfion, thefe Inftances afford an exceeding ftrong Argument in his Favours. When we confider, how ready a Set of hungry Creditors are to grasp at every thing that belongs to their Debitor, which can be converted into Money, it is furprizing fo few Inftances occur, of heritable Offices being adjudged. As the Search before us appears to have been a painful one, we will take it for granted, that the Inftances produced are all that are to be found upon Record. And when thefe amount to no more than half a Dozen,

Dozen, it is exceeding strong Evidence, that in all Ages it has been the established Opinion, that heritable Offices are not adjudgeable.

But whatever Weight be laid upon this Argument, one thing is certain, that Adjudications pass *periculo petentis*, without Examination. And if an hundred Instances had been produced, instead of six, they would be no Evidence of the Opinion of the Court of Session, that heritable Offices are adjudgeable, since no one Instance can be adduced, where the same has been objected to, and brought under Trial. And tho' further Instances could be adduced, of Charters granted by the Barons of Exchequer upon such Adjudications, a Mistake of the Barons, in point of Law, will not be supposed to have great Weight, in bringing about an Alteration of the Common Law of the Land, especially as it is a tender Point with the Barons to refuse Charters; it being an established Rule, that the King receives every Man. A Charter is scarce ever denied by the Barons, *valeat quantum valere potest*. Could Instances be produced of Liferent-offices being adjudged, and there is little doubt, that upon a Search of the Records, such Instances might be found, it would prove no more, than that Creditors, as Creditors, are apt to do, were grasping at a Right they could not make good? These would be so many Instances of Adjudications ineptly led, and the Instances given prove no more.

As to the 12th Branch, it cannot be disputed, that Offices may be strictly entailed, with the Consent of the Superior, as well as Lands.

The 13th Branch shows, That the Office of High Admiral and Chamberlain have been constituted as proper Feus. But it does not thence follow, that they are patrimonial! the direct contrary follows.

And the last Branch proves nothing, but that the Fees of the Office of High Constable were set in Tack to *William Henderson*, during the Life of the Granter *George Earl of Errol*. And the Pursuer knows no Law, to bar Tacks of Offices, whether liferent or hereditary, during the Granter's Life.

H. HOME.